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No. 05-1126

Supreme Court U.S.
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In the Supreme Court of the United States

BELL ATLANTIC CORPORATION, ET AL.,

Petitioners,

v.

WILLIAM TWOMBLY, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, CTIA – THE WIRELESS ASSOCIATION, THE ALLIANCE OF AUTOMOBILE MANUFACTURERS, NORTHWEST AIRLINES, INC., AND UNITED AIR LINES, INC., AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia and is the world's largest business federation. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber is well situated to brief the Court on the importance of the issues presented in the petition to companies collectively responsible for a substantial portion of total U.S. economic activity. The Chamber is concerned not only that the decision below sets a pleading standard for antitrust litigation that is inconsistent with both substantive antitrust law and general pleading law, but also that it does so in a context – a massive consumer class action complaint – that unleashes the most abusive kind of litigation, often brought to coerce settlement of weak cases rather than with any real prospect of success on the merits. By diverting resources away from productive economic uses, meritless antitrust actions threaten to slow the spread of new investments, reduce the efficiency of capital markets, and limit the competitiveness of the American economy. The membership of the Chamber thus has a strong interest in ensuring that the requirements of the federal antitrust

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* state that no counsel for a party has written this brief in whole or in part and that no person or entity other than the *amici curiae*, their members, or their counsel has made a monetary contribution to the preparation or submission of this brief.

laws and the Federal Rules of Civil Procedure are applied in a correct and uniform manner, weeding out meritless suits as quickly and regularly as practicable, to avoid undue harm to the Nation's commerce and industry.

CTIA – The Wireless Association represents all segments of the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and Internet companies, and other industry participants. CTIA has filed *amicus* briefs in this Court and other federal courts on a variety of issues of interest to the wireless industry in such disparate cases as *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001), and *City of Rancho Palos Verdes* v. *Abrams*, 544 U.S. 113 (2005). Many of CTIA's members provide service directly to consumers, and CTIA is concerned that the decision below might allow massive consumer class actions to proceed without any real factual basis.

The Alliance of Automobile Manufacturers is a trade association composed of nine car and light truck manufacturers. The Alliance is the leading advocacy group for the automobile industry on a range of public policy issues. The Alliance has long been concerned about abusive antitrust litigation, including vexatious class actions.

Northwest Airlines and United Air Lines are two of the world's five largest airlines. Each has been providing passenger service continuously since the 1920s. Northwest and United operate in an industry in which sustained profitability has been extremely elusive. Yet the forces of competition often leave particular routes served only by one or two carriers, and rational business decisionmaking in this industry necessarily depends on assessments of – but not agreement on – other carriers' likely responses. The resulting high "market shares" and appearances of interdependent carrier behavior may make airlines attractive targets for spurious antitrust litigation. If the pleading threshold is as low as the Second Circuit has indicated in the decision below, Northwest and United are concerned that they may be subjected to meritless antitrust litigation, including class actions,

brought by counsel in possession of observations of lawful "parallel" conduct by airlines but no facts at all to suggest an actual antitrust violation.

STATEMENT

The very first sentence of the district court's opinion gives a hint of just how remarkable the present litigation is: "Plaintiffs William Twombly and Lawrence Marcus bring this putative class action on behalf of themselves and *all other individuals who purchased local telephone or high speed internet services in the continental United States between February 8, 1996, and the present*." Pet. App. 35a (emphasis added). In fact, the case is even more gargantuan: "This lawsuit is brought as a class action on behalf of all individuals *and entities* who purchased local telephone and/or high speed internet services * * *." Am. Compl. ¶ 1 (emphasis added). Essentially, this is a lawsuit on behalf of virtually every business in the continental United States and every human being who has set foot in the continental United States over a multi-year period. Even more remarkably, this case is one in which the defendants are facilities-based local telephone service providers that serve the overwhelming majority of all consumers in the continental United States, and in which the allegation is that, but for a vaguely pleaded "conspiracy," the entire industry structure would have been different, with each defendant entering markets it has chosen not to enter. More remarkably still, this case involves what is essentially smoking-gun evidence that plaintiffs' counsel are engaged in opportunistic behavior in the hope of extorting a settlement, as they have filed and abandoned a complaint in one jurisdiction and then repackaged the same allegations – with the addition of a conclusory allegation of "conspiracy," alleged "upon information and belief" – in another jurisdiction. See Pet. 4-5; Am. Compl. ¶ 51.

Two courts below examined the complaint. The district court acknowledged that "[a]ll reasonable inferences are to be

drawn in the plaintiffs' favor." Pet. App. 40a.[2] The district court believed itself at liberty to examine the complaint through the lens of substantive antitrust doctrine and to dismiss the complaint because it alleged only lawful parallel conduct, with a conclusory "conspiracy" allegation tacked on. The court of appeals, by contrast – setting up the issue with unusual precision for this Court's review – reversed "[b]ecause we disagree with the standard that the district court applied in reviewing the sufficiency of the plaintiffs' allegations." Pet. App. 3a. Although parallel conduct is lawful, and "plus factors" is the shorthand phrase courts have come up with to describe the factors that can permit an inference that otherwise-lawful parallel conduct was the product of an unlawful conspiracy, the court regarded "plus factors" as irrelevant at the pleading stage. Pet. App. 25a ("plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal"). The court was prepared to let the antitrust complaint in this case go forward on the theory that "a pleading of facts indicating parallel conduct by the defendants" – *i.e.*, pleading *only* lawful behavior – "can suffice to state a plausible claim of conspiracy." *Ibid.*

The court of appeals criticized district court decisions (including the one it was reversing) that have looked to "plus factors" at the pleading stage as "elid[ing] the distinction between the standard applicable to Rule 12(b)(6) and Rule 56 motions on the basis of a well-founded concern that to do so otherwise would be to condemn defendants to potentially limitless 'fishing expeditions' – discovery pursued just 'in case anything turn[s] up' – in hopes, perhaps, of a favorable settlement in any event." Pet. App. 27a (footnotes omitted). Although the point of those decisions is simply that a complaint alleging only *lawful* con-

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[2] The court of appeals, surprisingly, went further and wrote that it would "accept[] as true all facts alleged in the complaint and draw[] all inferences" – not just reasonable ones – in favor of the plaintiff." Pet. App. 11a. Whether or not the court meant to state a different standard, it accepted inferences antitrust law forbids, as discussed below.

duct should be dismissed, the court of appeals viewed them as imposing an impermissible "heightened pleading requirement." *Id.* at 28a. The court was "not unsympathetic" to concerns about vexatious litigation (*ibid.*; see also *id.* at 30a) but thought such concerns irrelevant under this Court's precedents.

SUMMARY OF ARGUMENT

Federal Rule of Civil Procedure 8(f) commands that "all pleadings shall be so construed as to do substantial justice." *Conley* v. *Gibson*, 355 U.S. 41, 48 (1957), relied on that instruction and added that pleading should not be treated as a "game of skill" but that instead "[t]he purpose of pleading is to facilitate a proper decision on the merits." Those fundamental principles supported the position of the plaintiffs in *Conley* but support the position of the defendants in this case. Here plaintiffs – not defendants – are treating pleading as a game of skill, in which they can impose great cost on defendants through artful pleading, with no real facts to support their antitrust claims, in an effort to coerce settlement. This is neither "substantial justice" nor consistent with numerous decisions of this Court that approve the grant of motions to dismiss in analogous circumstances.

The antitrust claim in this case depends on the existence of a conspiracy, not mere parallel conduct. Substantive antitrust law – not a doctrine of civil procedure applicable only at the summary judgment stage – makes it critical that a plaintiff wishing to pursue conspiracy allegations have something more to point to than parallel conduct. The something more cannot be a barebones allegation of conspiracy. Instead, the plaintiff must allege some *facts* tending to show that the parallel conduct was not as innocent as it appears on its face – facts that can take many forms, but that courts have labeled collectively as "plus factors." The absence of any such allegations in the complaint supports dismissal under this Court's precedents.

Furthermore, the Federal Rules of Civil Procedure and this Court's cases do not constrain courts to close their eyes to the

practical consequences of allowing a dubious complaint to go forward. This Court's recent opinion in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 125 S. Ct. 1627 (2005), observed – as a factor supporting a Rule 12(b)(6) dismissal – that "allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause that the plaintiff has in mind would * * * permit a plaintiff 'with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.'" 125 S. Ct. at 1634 (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 741 (1975)). In applying the ordinary standards of Rule 8 and Rule 12(b)(6), the Court found it appropriate to consider the practical consequences of allowing the litigation to go forward. It is therefore simply not true – as the Second Circuit believed – that only a "heightened pleading requirement" will allow courts to examine antitrust complaints searchingly enough to avoid clogging the courts for years and rewarding plaintiffs' attorneys for bringing meritless claims. Pet. App. 28a.

The Second Circuit's error presents an issue of tremendous practical importance and merits review by this Court. Lawyer-driven class actions like this case systematically lead to what Judge Friendly, borrowing terminology from antitrust scholar Milton Handler, called "blackmail settlements." Just last year, the Senate Judiciary Committee expressed similar concerns, which have been voiced by many others through the years. The Second Circuit's new, low threshold for pleading antitrust conspiracy claims is particularly alarming because the same court – covering the commercial center of the United States – has previously announced a particularly low threshold for class certification. The two main ways that defendants can avoid paying blackmail settlements before summary judgment (achieving dismissal under Rule 12(b)(6) or defeating class certification) are thus both unduly difficult in the Second Circuit.

This case at this stage presents no class certification question, but it does provide this Court with a golden opportunity to correct a situation that – by the Second Circuit's own admission – leads to "a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted." Pet. App. 30a. A proper application of both substantive principles of antitrust law and the Federal Rules of Civil Procedure supports the district court's well-reasoned opinion dismissing the complaint. This Court should grant certiorari and reverse.

ARGUMENT

I. This Court's Motion-to-Dismiss Precedents Leave Ample Room to Weed out Vexatious Litigation by Applying the Sound Substantive Principle that Antitrust Law Limits the Range of Permissible Inferences from Ambiguous Evidence in a Case Under Section 1 of the Sherman Act

Conley v. *Gibson*, 355 U.S. 41 (1957), is often quoted for the plaintiff-friendly pleading standard it stated. *E.g.*, Pet. App 11a. But the case – in which a labor union stood idly by while a railroad employer purported to abolish 45 jobs held by African-Americans but then refilled the positions with white employees or with the same African-American employees with loss of seniority – is not one in which the Court evaluated the plaintiffs' complaint in a vacuum. Rather, the Court "[f]ollow[ed] the simple guide of [Federal] Rule [of Civil Procedure] 8 (f) that 'all pleadings shall be so construed as to do substantial justice.'" 355 U.S. at 48. The Court further decried the notion that "pleading is a game of skill." *Ibid.* "The purpose of pleading is to facilitate a proper decision on the merits." *Ibid.*

Those three principles – doing substantial justice, avoiding turning litigation into a game, and facilitating proper decisions on the merits – are principles that, in *Conley*, favored the plaintiffs over the efforts of the defendants to interpose technical objections to the plaintiffs' pleadings of blatant dis-

crimination. But they are *not* principles that *invariably* favor plaintiffs – at the motion-to-dismiss stage or at any other stage of litigation.

When a complaint reveals fatal flaws in the plaintiffs' theory of the case, doing substantial justice requires dismissing the complaint, not trying to imagine some hypothetical way for the fatal flaws to be overcome. *E.g.*, *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 483, 491 (1999) (affirming grant of motion to dismiss: "Considering the allegations of the amended complaint in tandem, petitioners have not stated a claim that respondent regards their impairment as *substantially limiting* their ability to work.").

The principle that game-playing litigation behavior should not be rewarded leaves room for courts to separate vexatious from meritorious litigation when evaluating a complaint. *E.g.*, *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 742-743 (1975) (reversing decision that had reversed grant of motion to dismiss: "in this type of litigation, where the mere existence of an unresolved lawsuit has settlement value to the plaintiff not only because of the possibility that he may prevail on the merits, an entirely legitimate component of settlement value, but because of the threat of extensive discovery and disruption of normal business activities which may accompany a lawsuit which is groundless in any event, but cannot be proved so before trial, such a factor is not to be totally dismissed"). *Conley* warned against making "one misstep by [plaintiffs'] counsel * * * decisive to the outcome," 355 U.S. at 48, but it is no less true that one clever step by plaintiffs' counsel (such as adding a conclusory "conspiracy" allegation "upon information and belief" to an otherwise facially groundless complaint) should not be enough to force an entire industry to endure massive litigation with no real foundation. But cf. Pet. App. 30a (suggesting that it would take a "re-calibration" of existing law to give courts any power to do anything about "the sometimes colossal expense of undergoing discovery," pressures to settle meritless claims whose success encourages others to be brought, and "the

overall result * * * [of] a burden on the courts and a deleterious effect on the manner in which and efficiency with which business is conducted").

And the third governing principle this Court identified in *Conley*, facilitating a proper decision on the merits, requires careful attention by courts to the substantive body of law a complaint seeks to invoke, and the lines that body of law draws between legal and illegal conduct. *E.g.*, *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (reversing Second Circuit decision that had reversed grant of motion to dismiss antitrust case: "The question before us today is whether the allegations of respondent's complaint fit within existing exceptions [to the general principle that a firm need not help its rivals] or provide a basis, under traditional antitrust principles, for recognizing a new one."); *id.* at 414 ("Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs."). Even at the motion-to-dismiss stage, this Court has never shied away from a searching application of substantive antitrust principles to the plaintiffs' theory of the case. Such an application is not, as the court of appeals mistakenly believed, applying a "heightened pleading standard." Rather, it is recognizing that the distinctions made important by substantive antitrust law should be observed at *every* stage of the litigation, so as to facilitate a proper decision on the merits.

The antitrust claim in this case depends on the existence of a conspiracy, not mere parallel conduct. The district court observed – correctly, and without contradiction by the court of appeals – that "parallel action is a common and often legitimate phenomenon, because similar market actors with similar information and economic interests will often reach the same business decisions." Pet. App. 41a; see also 6 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 1405a, at 21 (2d ed. 2003) ("Problematically, parallel conduct is often forced by circumstance: under such circumstances a 'rational' profit-

maximizing firm will always act in a way that is similar to its rivals.").

Courts have long openly grappled with the problems stemming from the prevalence of "parallel" business behavior, creating an opening for antitrust plaintiffs to try to claim that the firms acting in parallel *must* have agreed with each other to do so. More than 50 years ago, this Court addressed the issue in an opinion by Justice Tom C. Clark, who had previously been the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice. In *Theatre Enterprises, Inc.* v. *Paramount Film Distribution Corp.*, 346 U.S. 537 (1954), the Court declared emphatically that agreement may *not* be inferred from the parallel behavior alone. "Seemingly with some exasperation, the *Theatre Enterprises* opinion declared that 'circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.'" 6 AREEDA & HOVENKAMP, *supra*, ¶ 1412b, at 70 (quoting *Theatre Enterprises*, 346 U.S. at 541).

Just a few years after this Court decided *Theatre Enterprises*, a leading antitrust commentator wrote: "The point is that conscious parallelism is never meaningful by itself, but always assumes whatever significance it might have from additional facts." Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 658 (1962). Substantive antitrust law – not a doctrine of civil procedure applicable only at the summary judgment stage – makes it critical that a plaintiff wishing to pursue conspiracy allegations have something more to point to than parallel conduct. The something more cannot be a bare-bones allegation of conspiracy. Even in the Second Circuit, "a bare bones statement of conspiracy * * * without any supporting facts permits dismissal of a complaint." *Heart Disease Research Foundation* v. *General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972); accord, *e.g.*, *DM Research, Inc.* v. *College of*

American Pathologists, 170 F.3d 53, 56 & n.1 (1st Cir. 1999) (Boudin, J.). Instead, what must be alleged beyond parallel conduct is some *facts* tending to show that the parallel conduct was not as innocent as it appears on its face – facts that can take many forms, but that courts have labeled collectively as "plus factors." *E.g.*, Pet. App. 42a.[3]

Given that the purpose of examining plus factors is to separate lawful from unlawful conduct, it is mystifying why the court of appeals thought plus factors relevant at the summary-judgment stage but irrelevant at the motion-to-dismiss stage. It is not some peculiar feature of the summary-judgment standard, but rather "[a]ntitrust law," that "limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 588 (1986). "[C]onduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Ibid.*

Even if courts were powerless – as the Second Circuit thought it was – to consider at the motion-to-dismiss stage the practical consequences of unleashing massive litigation that would place enormous pressure on the defendants to settle a meritless lawsuit, there would be no reason to sustain a com-

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[3] Of course, a plaintiff claiming, in more than a conclusory allegation, to have direct evidence of conspiracy would be entitled to survive a motion to dismiss. But the closest thing in this complaint to direct evidence – a single quotation from a Qwest executive that entering another local telephone market "might be a good way to turn a quick dollar but that doesn't make it right," see Pet. 24 n.6 (quoting Am. Compl. ¶ 42) – is pathetically inadequate. As Judge Lynch correctly observed, "[c]onsidered in context, [the quoted] statements suggest only that [the executive] did not consider becoming a CLEC to be a sound long-term business plan." Pet. App. 56a. "One must not characterize a firm's sacrifice of short-run interest in favor of long-run interest as contrary to its self-interest. Such a sacrifice by itself tells us nothing about possible conspiracy * * *." 6 AREEDA & HOVENKAMP, *supra*, ¶ 1415e, at 99-100.

plaint that alleged lawful parallel conduct but none of the plus factors that might make it unlawful. See *Dura Pharmaceuticals, Inc.* v. *Broudo*, 125 S. Ct. 1627, 1634 (2005) (the holding that plaintiffs must *prove* particular facts to prevail leads also to conclusion they must *allege* those facts to survive a motion to dismiss); *Associated General Contractors* v. *California State Council of Carpenters*, 459 U.S. 519, 526 (1983) ("It is not * * * proper to assume the [plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged."). But the Federal Rules of Civil Procedure and this Court's cases do not, in fact, constrain courts to close their eyes to the practical consequences of allowing a dubious complaint to go forward. As already noted, Federal Rule of Civil Procedure 8(f) commands that "[a]ll pleadings * * * be so construed as to do substantial justice," a command hardly compatible with knowingly allowing "potentially limitless 'fishing expeditions'" (Pet. App. 27a) and "a deleterious effect on the manner in which and efficiency with which business is conducted" (*id.* at 30a). And this Court's recent *Dura* opinion found it appropriate to observe – as a factor supporting a Rule 12(b)(6) dismissal – that "allowing a plaintiff to forgo giving any indication of the economic loss and proximate cause that the plaintiff has in mind would * * * permit a plaintiff 'with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence.'" 125 S. Ct. at 1634 (quoting *Blue Chip Stamps*, 421 U.S. at 741).

Notably, before making those observations, the Court stated that it "assume[d], at least for argument's sake, that neither the Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss." 125 S. Ct. at 1634. The Court acknowledged the "simple test" of *Conley* v. *Gibson*, *supra*, and the "not * * * great burden" of *Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 513-515 (2002). Still, in applying the ordinary standards of

Rule 8 and Rule 12(b)(6), the Court found it appropriate to consider the practical consequences of allowing the litigation to go forward. It is therefore simply not true – as the Second Circuit believed – that only a "heightened pleading requirement" will allow courts to examine antitrust complaints searchingly enough to avoid clogging the courts for years and rewarding plaintiffs' attorneys for bringing meritless claims. Pet. App. 28a.

The present case is based on a theory that an entire industry would have been structured differently but for antitrust violations. It should give a court pause that such a far-reaching lawsuit might be allowed based on such a toothless review of the complaint's allegations as that undertaken below. The massive scope of plaintiffs' complaint is *not* irrelevant to the degree of scrutiny it should have received in the courts below. This is not a complaint about 45 railroad jobs, as in *Conley* v. *Gibson*, or a complaint about one person's allegedly discriminatory demotion and constructive discharge, as in *Swierkiewicz*. It is not even a complaint about declines in the price of one stock, as in *Dura* – in which this Court nevertheless found the *in terrorem* effect of litigation highly relevant to the 12(b)(6) inquiry. It is a mega-lawsuit in which the purported plaintiff class is hundreds of millions of persons and businesses, and the defendants are an entire industry. A rule of civil procedure meant to promote "substantial justice" does not require a pretense that such a lawsuit is the same as a relatively small case, when the consequence is to empower the organized class-action bar to bring meritless lawsuits for the sole purpose of coercing settlements. "Certainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed." *Associated General Contractors*, 459 U.S. at 528 n.17.

II. Allowing Plaintiffs to Proceed Past the Pleading Stage, Without any Indication that They Have Evidence or a Theory on Which They Could Actually Prevail, Will Coerce Blackmail Settlements of Meritless Cases

The question presented by this case is of tremendous practical importance and merits resolution by this Court. Indeed, the Second Circuit itself was forthright in acknowledging the nature of the beast its decision was unleashing. See Pet. App. 27a-28a, 30a. The court even went so far as to admit that "the success of such meritless claims [in coercing settlements] encourages others to be brought." *Id.* at 30a.

It is no accident that the pleading question presented by this case arises in the context of a putative class action brought by a law firm that is part of the organized plaintiffs' class-action bar. Lawyers, not clients, drive cases of this sort. See *In re Network Associates, Inc., Securities Litigation*, 76 F. Supp. 2d 1017, 1032 (N.D. Cal. 1999) (quoting attorney William S. Lerach: "I have the greatest practice in the world because I have no clients. I bring the case. I hire the plaintiff. I do not have some client telling me what to do. I decide what to do.").

The impetus for cases like this one is not actual suspicion of wrongdoing, and certainly not the expectation that an actual trial on the merits will yield success, but the hope that the thinnest of allegations, with the greatest of legal consequences, will survive motions to dismiss and begin to put pressure on defendants to settle complex litigation. See Linda Silberman, *The Vicissitudes of the American Class Action – With a Comparative Eye*, 7 TUL. J. INT'L & COMP. L. 201, 205 (1999). Judge Friendly – borrowing a term used earlier by antitrust scholar Milton Handler – termed this the "blackmail settlement." HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973) (citing Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits – The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971)).

The Senate Judiciary Committee observed last year:

> Because class actions are such a powerful tool, they can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly. Such leverage can essentially force corporate defendants to pay ransom to class attorneys by settling – rather than litigating – frivolous lawsuits. This is a particularly alarming abuse because the class action device is intended to be a procedural tool and not a mechanism that affects the substantive outcome of a lawsuit. * * * [W]hen plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success.
>
> Not surprisingly, the ability to exercise unbounded leverage over a defendant corporation and the lure of huge attorneys' fees have led to the filing of many frivolous class actions.

S. Rep. No. 109-14, at 20-21 (2005), *reprinted in* 2005 USCCAN 3, 21.

Former Attorney General Dick Thornburgh put the matter even more bluntly seven years earlier in testimony before the House Judiciary Committee:

> There is nothing inherently wrong with the general concept of the class action lawsuit or the theory of aggregation of claims. These suits have held an honored place in American law and in British common law for centuries. Adjudication for a class has always been feasible whenever class members have a common legal interest that could not practically be resolved one at a time.
>
> * * * * *
>
> Relatively recently, however, plaintiffs' lawyers, often styling themselves consumer attorneys, have been allowed to wield class actions as judicial weapons of mass destruction.

> These suits promise such devastating consequences that even the most innocent of defendants must settle or risk near total annihilation.
>
> To add insult to these injuries, these plaintiffs' lawyers purport to hold the moral high ground. They act as if they were not mere attorneys, but private sector attorneys general. Yet, they are not bound or constrained in any way by Democratic processes.
>
> * * * * *
>
> Far more corrupting to the law, these class actions are often initiated, not by the class members themselves, but by a group of class action lawyers who divide up shares of litigation as if lawsuits were investment properties.

Mass Torts and Class-Action Lawsuits: Oversight Hearings Regarding Mass Torts and Class Action Lawsuits Before the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, 105th Cong. 29-30 (Mar. 5, 1998) (testimony of former Attorney General Dick Thornburgh), available at http://commdocs.house.gov/committees/judiciary/hju59921.000/hju59921_0.HTM.

The pressure to settle does not begin only as a case approaches trial, but as discovery expenses mount up, before the defendants can ever move for summary judgment. In most cases, there are only two opportunities for the defendants to ease the settlement pressure before the summary-judgment stage: the filing of a motion to dismiss, and opposition to a motion for class certification. In the decision below, the Second Circuit has made the first opportunity practically unavailable even in the most obviously meritless of antitrust cases, in which a warmed-over complaint adds a conclusory allegation of "conspiracy" to allegations of lawful parallel conduct. See also *Discon, Inc.* v. *NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996) (reversing dismissal of antitrust complaint), rev'd, 525 U.S. 128 (1998) (unanimous decision); *Law Offices of Curtis V. Trinko, L.L.P.* v. *Bell Atlantic Corp.*, 305 F.3d 89 (2d Cir. 2002) (reversing dismissal

of antitrust complaint), rev'd, 540 U.S. 398 (2004) (unanimous decision).

In an earlier – and widely criticized – decision, the Second Circuit made the second opportunity practically unavailable in a case of any complexity as well. In another massive antitrust case, the Second Circuit declared that a district court may certify a class as long as a plaintiff can come up with admissible expert testimony to support class certification. A district court must only "ensure that the basis of the expert opinion is not so flawed that it would be inadmissible as a matter of law." *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.2d 124, 135 (2d. Cir. 2001), cert. denied, 536 U.S. 917 (2002). "[A] district court may not weigh conflicting expert evidence or engage in 'statistical dueling' of experts. The question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate common questions of fact warranting certification of the proposed classes, not whether the evidence will ultimately be persuasive." *Ibid.* (citations omitted). Other circuits have rejected that approach. The most recent example is *In re Polymedica Corp. Securities Litigation*, 432 F.3d 1, 5-6 (1st Cir. 2005), in which the First Circuit expressly rejected the *Visa Check/MasterMoney* precedent, and instead opted to follow "the majority of courts of appeals that have addressed this issue, [holding that] a district court * * * instead should make whatever legal and factual inquiries are necessary to an informed determination of the certification issues." An earlier and pithier criticism was that an approach to class certification like the Second Circuit's "cannot be found in Rule 23 and has nothing to recommend it." *Szabo* v. *Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001).[4]

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[4] *Amici* the Chamber, the Alliance of Automobile Manufacturers, and Northwest Airlines have each unsuccessfully urged this Court to resolve the circuit split pertaining to class certification standards between, on the one hand, courts that follow the Second Circuit's approach and, on the other hand, the approach of at least the First, Third, Fourth, Fifth, and

Combining an inappropriately low threshold for pleading antitrust claims with an inappropriately low threshold for achieving class certification makes the Second Circuit – which includes the commercial center of the United States – a nightmare jurisdiction in which to defend a putative class action under the antitrust laws. This Court has recognized that "[c]ertification of a large class may so increase the defendant's potential economic damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978). Class certification presents such pressures because defendants cannot "stake their companies on the outcome of a single jury trial." *In re Rhône-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995). Yet defeating certification has long been unduly difficult in the Second Circuit, and now defeating meritless antitrust claims at the motion-to-dismiss stage will be unduly difficult as well. The result is an intolerable burden on the business community.

This case presents the Court with an excellent opportunity to apply to massive antitrust class actions both the substantive principles of *Matsushita* and *Theatre Enterprises* and the principle expressly stated in the governing Federal Rule of Civil Procedure that pleadings shall be so construed as to do substantial justice. The well-reasoned opinion of the district court dismissing the complaint complies with those principles, and the opinion of the court of appeals semi-apologetically reversing, while recognizing all the deleterious features of its own decision, does not. Parallel conduct is not a violation of the antitrust

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Seventh Circuits. See Petition for a Writ of Certiorari, *Northwest Airlines Corp.* v. *Chase*, No. 02-1447 (filed March 31, 2003, denied June 2, 2003); Brief for the Chamber of Commerce of the United States as *Amicus Curiae* in Support of Petitioner, *UnitedHealth Group, Inc.* v. *Klay*, No. 04-522 (brief filed Dec. 3, 2004, cert. denied Jan. 10, 2005); Brief of the Alliance of Automobile Manufacturers et al. as *Amici Curiae* in Support of Petitioners, *Visa U.S.A. Inc.* v. *WalMart Stores, Inc.*, No. 01-1464 (filed May 6, 2002, cert. denied June 10, 2002).

laws, and a complaint that adds nothing of real substance to lengthy allegations of parallel conduct should not be allowed to launch huge, costly litigation purportedly on behalf of hundreds of millions of plaintiffs. This Court can and should grant certiorari and reverse.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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